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IN THE

ALEXANDER L STEVAS,
CLERK**Supreme Court of the United States****October Term, 1984**

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

vs.

**PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, et al.,**
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

**BRIEF OF THE PUBLIC SERVICE COMMISSION
AND THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AMICUS CURIAE**

DAVID E. BLABEY*

Counsel to the Public Service

Commission of the State of New York

TIMOTHY P. SHEEHAN

Three Empire State Plaza

Albany, New York 12223

(518) 474-2510

Attorneys for the Public Service

Commission of the State of New York

ROBERT ABRAMS

Attorney General of the

State of New York

PETER BIENSTOCK

MARY GUNDRUM

Two World Trade Center

New York, New York 10047

(212) 488-7507

Attorneys for the Attorney General

of the State of New York

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* Counsel of Record

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No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY,
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vs.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

**BRIEF OF THE PUBLIC SERVICE COMMISSION
AND THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK AS *AMICUS CURIAE***

The Public Service Commission and the Attorney General of the State of New York hereby submits this brief as *amicus curiae* in support of the Appellee Public Utilities Commission of the State of California (California PUC).¹ We respectfully urge the Court to affirm the judgment of the California Supreme Court in all respects.

¹ Pursuant to Rule 36.2, there have been filed with the Clerk of the Court the written consents of all parties to the filing of this brief.

Interest Of Amicus Curiae

Like the California PUC, the Public Service Commission of the State of New York (New York PSC) is charged with the responsibility of regulating electric, gas, telephone, and water utilities to ensure that essential public services are furnished to consumers under nondiscriminatory terms and at just and reasonable rates. See N.Y. Pub. Serv. Law, §§65, 89-b, 91. Pursuant to this mandate, New York has determined (as California did before it) that utility ratepayers, like utility shareholders, should be permitted access to the substantial "extra space" that exists in the monthly (or bi-monthly) billing envelopes received by ratepayers from their respective utility companies. See *Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities Billing Envelopes* (N.Y.P.S.C. Case 28655, May 14, 1984), *reh'g denied* (Nov. 14, 1984), reproduced in the Appendix to PGandE's Jurisdictional Statement, at 111a-138a. Such ratepayer access is to be accomplished by allowing one or more nonprofit, voluntary ratepayer organizations to enclose inserts in the customer billing envelope several times per year. Such inserts would typically inform ratepayers of the organization's existence and its function of representing ratepayers in regulatory proceedings, seek ratepayer membership therein, and (perhaps) discuss various utility/energy-related issues. A principal objective of providing billing envelope access to ratepayer groups is to provide citizen-ratepayers with a more direct and meaningful opportunity to participate in the regulatory process, thereby enhancing the fact-finding and decisional process, and contributing to the

State's substantial governmental interest in maintaining just and reasonable rates for utility service.² App. to Juris. Statement 118a, 138a.

In establishing its ratepayer access procedures, the New York PSC was sensitive to the fact that the utilities' speech is entitled to First Amendment protection. It also recognized that it is the ratepayers which have created and financed the "extra space" in the billing envelope through the utility rates they pay, that the billing envelope and its contents have long been subject to public interest regulation by the State, and that utility shareholders have used such "ratepayer-financed" extra space to disseminate their particular views on various political, social and service-related topics of the day.

New York is vitally interested in the outcome of the instant case because the procedures we have implemented to ensure that the utilities' First Amendment rights are not infringed are similar to those employed by the California PUC. Specifically, both New York's and California's access programs do not restrict the utilities from continuing to enclose inserts in the billing envelope, even in those months when a ratepayer

² In its Case 28655 *supra*, the New York PSC received extensive oral and written statements and briefs from a diverse group of interested parties, including regulatory, utility, and consumer officials from New York and across the country. *Id.*, Transcript Vols. I-VI. Many of these officials expressed their belief that ordinary ratepayers lacked a meaningful opportunity to participate in and impact on the rate-setting process. This circumstance was contrasted vividly to the recognized ability of the utilities to present and litigate their case in the regulatory process. In rendering its decision in Case 28655 the New York PSC concluded that increased ratepayer representation in the regulatory process was in the public interest. App. to Juris. Statement 138a.

group has accessed some or all of the "extra space." And, under both programs, ratepayer organization inserts will be clearly identified as such, thus making it extremely unlikely that the views expressed in such inserts will be identified as those of the utility or its shareholders. Given these and other similarities between California's and New York's programs, the Court's disposition of the instant case may very well determine whether New York's ratepayer access process goes forward.³

Summary Of Argument

First, much of PGandE's First Amendment argument is based on the premise that its ability to continue to communicate with ratepayers through the vehicle of the billing envelope is being suppressed. This premise is, quite simply, incorrect. Second, PGandE's assertion to the effect that "its own billing envelopes" are somehow immune from legitimate public interest regulation by the State is utterly devoid of merit. Finally, the Court's holding in *PruneYard Shopping Center v. Robins* (447 U.S. 74) dictates rejection of PGandE's arguments concerning an alleged infringement of its right to refrain from speaking or associating with the speech of others.

³ By decision issued April 10, 1985, the New York Supreme Court (Albany County) invalidated the Commission's access procedures as violative of the utilities' First Amendment rights. *Matter of Consolidated Edison Co. of N.Y. v. Public Service Comm.*, Index No. 10762-84. Our appeal to the Appellate Division, Third Department, is pending.

ARGUMENT

I. PGandE's Continued Use Of The Billing Envelope As A Means Of Communicating With Ratepayers Is Not Restricted By The California PUC's Decisions.

In *Consolidated Edison Co. v. Public Service Comm'n* (447 U.S. 530), the Court invalidated a New York PSC determination which had prohibited utility companies from using the billing envelope to communicate their views to ratepayers on "controversial issues of public policy." The Court held that the New York PSC's outright ban on such use of the billing envelope "directly infringed" on the utilities' freedom of speech and that New York's action was neither a valid time, place or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. *Id.* at 544.

In an attempt to analogize the facts of the instant case to those present in *Consolidated Edison*, PGandE characterizes the California PUC's decisions herein as similarly restricting or suppressing its ability to use the customer billing envelope as a means of disseminating its views and communicating with ratepayers. Specifically, PGandE states that it is problematical whether it "will be able to speak to its customers at all during those four months" per year when TURN has been granted access to the extra space in the billing envelope and that California's decisions will "severely restrict PGandE's ability to select the content of the billing envelope sent to customers." Brief for Appellant, p. 12.

This attempt to analogize California's ratepayer access procedures to the outright ban on certain utility bill inserts at issue in *Consolidated Edison* should be rejected for it is *undisputed* that California's decisions do

not suppress, bar, or otherwise restrict PGandE from continuing to fully use the billing envelope as a means of communicating with ratepayers. Specifically, during the eight months per year when TURN is not accessing the extra space in the billing envelope, PGandE is free to enclose its own inserts in such extra space, thus allowing PGandE's shareholders to continue to enjoy a "free ride" for the dissemination of their views to ratepayers. See, generally, *Consolidated Edison, supra*, 447 U.S. at 551-555 (Blackmun, J., dissenting). And during the four months when TURN is accessing the extra space, the California PUC's decisions permit PGandE to utilize any remaining extra space,⁴ again without its shareholders being assessed any of the fixed costs of such communication. Moreover, if PGandE determines in any of those four months that such remaining "extra space" is insufficient to accommodate all of its shareholders' communications, *nothing in the California PUC's decision prevents PGandE from enclosing as much communicative material in the billing envelope as it wishes*. While it is true that in these circumstances PGandE's shareholders may have to bear the postage costs⁵ associated with their communications—and thus

⁴ In the Order Instituting Proceeding in its Case 28655, *supra*, the New York PSC determined that there was "extra space" in the billing envelope even in those months when the utilities had enclosed their own inserts. *Id.* at p. 4. Thus, a ratepayer group's insert will not necessarily use all (or even most) of the extra space in any particular month's billing envelope.

⁵ The *amicus curiae* Consolidated Edison Company of New York, Inc. estimates on brief (p.4) that the postage costs to be borne by PGandE's shareholders would be \$630,000 per mailing. This figure can be seen to be both *de minimus* and reasonable when one considers that PGandE's annual operating revenues are in excess of \$7.8 billion and that the billing envelope is an extremely effective medium for disseminating (or promoting) one's views.

not enjoy the "free ride" for their communications they have grown accustomed to—such circumstances clearly do not constitute restriction or suppression of PGandE's ability to communicate with ratepayers through the use of the billing envelope. See *Matter of Consolidated Edison Co. of N.Y. v. Public Serv. Comm.*, 107 AD2d 73 (N.Y. App. Div., 3d Dept., Feb. 21, 1985), *appeal pending*. Nor do such circumstances otherwise constitute State infringement of PGandE's First Amendment expressional rights for it is well-settled that the State is *not* obligated to ensure that a corporation's exercise of such rights is subsidized. See *Regan v. Taxation With Representation*, ____ U.S. ____, 103 S.Ct. 1997 at 2001 ["We again reject 'the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'"]; *Rochester Gas & Elec. Co. v. Public Service Comm.*, 51 NY2d 823, 824-825, app dsmd for lack of substantial federal question 450 U.S. 961.

II. PGandE's Argument That "Its Billing Envelopes" Are Somehow Immune From Public Interest Regulation By The State Is Meritless.

Throughout its brief, PGandE makes assertions to the effect that California's regulatory scheme permitting ratepayer access to "its billing envelopes" is impermissible because PGandE "owns" such envelopes and does not wish to allow such access. See Brief for Appellant, pp. 9-10, 14, 20-21, 32-33. This apparent suggestion that the State is somehow barred from regulating the billing envelope (which is one of the most important and visible aspects of a utility's rendition of service) is contrary to well-settled principles of utility regulation.

From virtually the inception of public utility regulation in this country, the Court has held that one of the most vital of the States' police powers is the authority to regulate in the public interest utility companies conducting business within their boundaries. See, e.g., *Munn v. Illinois* (94 U.S. 113, 125-130); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm.* (____ U.S. ____, 103 S. Ct. 1713, 1723); *Arkansas Elec. Co-op Corp. v. Arkansas Public Comm'n* (____ U.S. ____, 103 S. Ct. 1905, 1908). And the Court has consistently recognized that the property of utility companies, as monopoly (or quasi-monopoly) enterprises possessing great economic power by virtue of the essential services they provide, is subject to extensive regulation by the States to ensure that consumers are protected from monopoly exploitation. *Cantor v. Detroit Edison Co.* (428 U.S. 579, 595-596); *Jackson v. Metropolitan Edison Co.* (419 U.S. 345, 350-351). The extent to which the States are empowered to regulate a utility's property is very broad; for instance, the New York PSC possesses explicit authority over "all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity . . ." N.Y. Pub. Serv. Law, §§2(12); 5(2). The California PUC has similarly been vested with extremely broad power to regulate virtually all aspects of the utilities' property and operations. See, e.g., Cal. Pub. Util. Code §762 ["Whenever the Commission . . . finds that additions, extensions, repairs, or improvements to, or changes in the existing plant, equipment, apparatus, facilities or other physical property of any public utility . . . ought reasonably to be made . . . to promote the security or convenience of . . . the public . . . the Commission shall make and serve an

order directing that such extensions, repairs, improvements or changes be made . . ."] (emphasis added); see also *Id.*, §§761, 701.

Upon consideration of this virtual *plenary* authority over utilities' property that the States possess, it is absurd for PGandE to suggest that the billing envelope, as its "private property," is somehow not subject to legitimate public interest regulation by the State. Indeed, PGandE is unable to offer any rational explanation as to why the California PUC can admittedly regulate its "plant, equipment, facilities or other physical property" (Calif. Pub. Util. Code §762), but not, according to PGandE, the billing envelope and its contents. PGandE's property argument should be rejected.

One final point illustrates the flawed nature of PGandE's claim that it cannot legally be compelled by the State to enclose messages in the billing envelope which it does not wish to enclose (Brief for Appellant, p. 9). In *Consolidated Edison*, *supra*, the Court expressly recognized that utilities can, in fact, legally be directed by the State to enclose inserts in the billing envelope. 447 U.S. at 543. Indeed, many states (including New York) have enacted statutes or regulations granting their respective public utility commissions broad authority over the contents of the customer bill and envelope, with such authority including the power to direct the inclusion of certain types of bill inserts found necessary to the public interest and convenience. See, e.g., N.Y. Pub. Serv. Law, §66(12-a).

III. The Court's Holding In *PruneYard* Dictates Rejection Of PGandE's Argument Concerning An Alleged Infringement Of Its Right To Refrain From Speaking Or Associating With The Speech Of Others.

Like the appellant in *PruneYard Shopping Center v. Robins* (447 U.S. 74), PGandE's central argument in this case is that it has an inviolate First Amendment right, as an owner of commercial property, never to be required by the State to allow such property to be used as a forum for the speech of others. Brief for Appellant, pp. 13-20. PGandE argues that by allowing TURN to place inserts "in its billing envelopes," the California PUC is impermissibly compelling it to "publish," "foster," and become associated with "ideological messages" it will find objectionable. *Id.* at 14-17. Again, like the appellant in *PruneYard*, PGandE relies principally on *Miami Herald Publishing Co. v. Tornillo* (418 U.S. 241) and *Wooley v. Maynard* (430 U.S. 705) as support for its argument.

As dictated by the Court's decision in *PruneYard*, PGandE's attempted application of the holdings in *Tornillo* and *Wooley* to the facts of the instant case need be rejected for several reasons. First, as expressly recognized by the Court in *PruneYard* (447 U.S. at 88), *Tornillo* involved the First Amendment *free press* issue of editorial control over *newspapers*—it did not involve other more obscure (and heavily regulated) means of communicating such as the customer billing envelope at issue here. Second, as also recognized in *PruneYard*, *Wooley* involved facts where the government itself prescribed the content of the ideological message ("Live Free or Die") and was thus seeking to convey an "official view" of state history and pride through such message's dissemination. *Wooley*, 430 U.S. at 717. And due to the

means of displaying the message at issue in *Wooley*, there was a likelihood that the appellee Mr. Maynard could be identified as fostering and adhering to such message.

Such circumstances clearly are not present in the instant case. The California PUC (like the New York PSC) is obviously *not* prescribing, in any way, the content of the ratepayer organization's messages (only TURN, of course, will determine the content of its own messages) and for anyone to suggest otherwise is to ignore the aggressive independence that ratepayer organizations traditionally maintain. And, like the commercial enterprise in *PruneYard*, there is no real possibility that the views of the speaker (*i.e.*, TURN) will be identified as those of PGandE's for such messages will indisputably be identified as TURN messages. Indeed, PGandE's argument that ratepayers will likely conclude that PGandE supports or adheres to the views of TURN (Brief for Appellant, p. 19) is difficult to understand if one credits PGandE's assertions that TURN's messages will be hostile toward the company.

In addition to the facts in *PruneYard* that (1) the "ideological message" was not being prescribed by the State and (2) there was no likelihood that the speakers' views would be identified as those of the property's owners, the Court also deemed it essential that the property owner could expressly "disavow" any connection or association with the speakers or their message by, for instance, posting a sign stating that such speakers are communicating on the property by virtue of state law. *PruneYard*, 447 U.S. at 87. In the instant case, it is *undisputed* that PGandE can similarly

"disavow" any connection or association with the speaker (*i.e.*, TURN) by inserting in the billing envelope a disclaimer to that effect.

The final decisional factor set forth in *PruneYard* was that the property, as a business establishment, was not limited to the exclusive and private use of the owner. *Id.* Such circumstance is present in the instant case for as set forth in Point II, *supra* (and as documented in detail in the California PUC's brief), the customer billing envelope has not been limited to the exclusive or private use of PGandE. Rather, as regulated property used in the rendition of essential public services, the billing envelope has long been accessed by the State for a myriad of public purposes such as informing ratepayers of proposed rate and service changes, informing ratepayers of their rights *vis-a-vis* termination of service issues, and the like.

In sum, the factual circumstances in *PruneYard* are much more analogous to the instant case than those present in either *Tornillo* or *Wooley*. Inasmuch as PGandE's argument on the "compelled speech" and "forced association" issues are based largely on these two latter cases, the Court should reject PGandE's analysis.

Conclusion

For the reasons stated, the New York PSC respectfully requests that the judgment of the California Supreme Court be affirmed.

Respectfully submitted,

DAVID E. BLABEY*
Counsel to the Public Service
Commission of the State of New York

TIMOTHY P. SHEEHAN
Three Empire State Plaza
Albany, New York 12223
(518) 474-2510
Attorneys for the Public Service
Commission of the State of New York

ROBERT ABRAMS
Attorney General of the
State of New York
PETER BIENSTOCK
MARY GUNDRUM
Two World Trade Center
New York, New York 10047
(212) 488-7507
Attorneys for the Attorney General
of the State of New York

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* Counsel of Record